United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

For the Second Circuit.

P/S

DIVERSIFIED MORTGAGE INVESTORS,

Plaintiff-Appellee,

-against-

U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellant.

On Appeal From the United States District Court For The Southern District Of New York

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted in reply to appellee's brief and will deal specifically with the arguments raised by appellee.

REPLY TO POINT I OF APPELLEE'S BRIEF

A.) Appellee makes no argument in its brief as to the existence of any legal interest to be protected in this action other than the reimbursement of any loss it might eventually suffer by virtue of appellant's negligence within the policy limits.

It must be reiterated, as we have constantly maintained, that appellee is a mere mortgage holder and has no legal or equitable interest in the subject property other than its mortgage lien. Thus, the examples of the harm that would accrue to appellee in the event the injunction is not granted are illusory. Its economic interests are not susceptible to protection of this Court because at the most, all this court can declare is that appellant is liable under its insurance contract. It cannot give appellee the right to

sell the land, develop it or otherwise control it unless and until a mortgage foreclosure action has been concluded in the State Court. As we pointed out, at page 24 of our main brief, appellee has never attempted to take the steps necessary to protect its mortgage lien, and, indeed, has hindered appellant from taking those steps in the State litigation.

B.) We rely on our main brief as to the prejudice the appellant has suffered as a result of the granting of the preliminary injunction. Apart from the specific problems appellant will face in litigating this case, it is respectfully submitted that there is no necessity to subject it to fighting a two-front war against the lienors and its insured. Additionally, we reemphasize our point that the granting of the preliminary injunction specifically took away a substantive right under the contract of insurance without any inquiry into the merits of appellee's claim with respect to that right.

C.) Appellee contends it presented serious questions going to the merits of the controversy and that, therefore, the grant of the preliminary injunction was proper. There is no dispute that there is no justiciable controversy between the parties if the mortgage which appellant insured was not a building loan mortgage. In that case, appellee's lien suffers no impairment and the mechanics lienors have no priority over appellee's lien. At pages 15 through 21 of our main brief, we establish conclusively as a matter of law that the mortgage was a standard mortgage and that a building loan was not involved. Appellee's entire response, at page 17 of its brief, is a bald allegation that the complaint is meritorious. Coupled with the claim that the question is not reviewable, that argument is tantamount to an admission that appellant's position is proper as a matter of law and that there is no merit to the complaint.

A serious question of law does not mean an esoteric question which is interesting in itself. It means a question that is susceptible of serious dispute. Under the law cited in our main brief, there is no dispute. There is no building loan mortgage

involved and appellee's lien is superior to that of the mechanics lienors.

All of the other questions presented by appellee are derivative in nature, and can only arise if the underlying question of the priority of the mortgage is resolved in favor of the mechanics lienors. If we are correct in our analysis of that underlying issue the other "serious questions" are moot.

IN REPLY TO POINT II OF APPELLEE'S BRIEF

Obviously uncom ortable with its positions on the issues of law raised in the appellant's brief, appellee has attempted to finesse those questions by arguing for the proposition that the District Court's decision on the questions of jurisdiction, joinder of parties and sufficiency of the complaint are not appealable. In point of fact, the Court only decided the issue of dismissal in general terms, without reference to the specific grounds on which the application was made. In any event, it is quite clear, that, although not directly appealable, the questions raised by the appellant both b low and in this Court are properly subject to review on appeal rom a motion granting a preliminary injunction. As stated in Moore's Federal Practice, Second Edition, Volume 9, Paragraph 110.25[1]:

> "An appeal from an injunctive order supports review of an order denying a motion to dismiss for failure to state a cause of action, for improper venue, for lack of jurisdiction, and for lack of standing".

This Court has taken the lead in seeing what is plainly to be seen in the record. *Hurwitz v. The Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir. 1966) cert. denied 385 U.S. 971 (1966). See also *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426 (2d Cir. 1967); *Austin v. Altman*, 332 F.2d 273 (2d Cir. 1964).

There is no point in extending a litigation that is non-meritorious because of technical lack of appealability of specific

issues. That is why this Court has held that where the Court of Appeals is in as good a position to determine the issues as is the District Court, such being the case here where no evidentiary hearing was heard below, the Court has a broader scope of review of the District Court's action. *Dopp v. Franklin National Bank*, 461 F2d 873, 879 (2d Cir. 1972). It would hardly seem appropriate to establish standards for the granting of a preliminary injunction based on a balancing of hardships and the related issues, and to prevent the Court of Appeals from looking into the underlying issues of the case. Such is not the law. *Deckert v. Independence C.E. Shares Corp.*, 311 U.S. 282 (1940); *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968). *American Chemical Paint Co. v. Dow Chemical Co.*, 161 F2d 946 (6th Cir. 1947). *Pang-Tsu Mow v. Republic of China*, F.2d 201, 195 (C.A. D.C. 1952); *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897); *Cutting Room Appliances Corp. v. Empire Cutting Machine Corp.*, 186 F.2d 997 (2d Cir. 1951); *Mayflower Industries v. Thor Corp.*, 184 F2d 537 (3rd Cir. 1950). *Alloyd General Corp. v. Building Leasing Corp.*, 361 F.2d 359 (1st Cir. 1966). *Teamsters Local Union 745, etc. v. Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371 (5th Cir. 1970). *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3rd Cir. 1972). *Johnson v. Alldredge*, 488 F.2d 820 (3rd Cir. 1973).

A. Appellee has misstated the basic issue with respect to the contract of insurance, and has raised only the collateral issues inferentially. The underlying issue is whether the insured mortgage was a building loan mortgage that was required to be filed pursuant to Section 22 of New York Lien Law. There are no adverse legal interests involved in that question. Both the appellee, as holder of the mortgage, and appellant, as insurer of the mortgage, have the precise same legal interest; i.e., a holding that the mortgage is superior to the lien of the mechanics liens filed subsequent to the filing of the mortgage. Appellee's economic interest may be served by some other approach, but its legal interest is identical with that of appellant. There is no justiciable controversy existing between the parties.

B. We rely on the cases cited in our main brief for the proposition that the mechanics lienors are indispensible parties. It is interesting to note that for the purpose of this argument, however, appellee takes the position that the State court mechanics liens action is in the nature of an in rem action. Appellee has denied that it is such in, terms of its argument on the alleged irrepairable injury to be suffered by appellee if the preliminary injunction was not granted, but its analysis here is much closer to reality.

We note in this regard, that in citing a decision dropping certain parties because diversity jurisdiction would be defeated by their inclusion, appellee has not responded to our argument that it deliberately did not name the lienors because of the diversity problem. This is especially interesting where, as here, there was already an existing action between the lienors and the appellee. This is an obvious case of forum shopping.

C. We have adverted to this argument above, and do not reiterate.

IN REPLY TO POINT III OF APPELLEE'S BRIEF

Assuming arguendo that appellee's statement of the law is correct, it is beyond cavil that appellant has established that the State Court action would be dispositive of the controlling issue on this action. That issue is whether the insured mortgage was a building loan mortgage or an ordinary mortgage. Plaintiff in the State Court action cannot succeed unless they prove there was a building loan mortgage.

If they fail, this case falls in its entirety. Surely, there can hardly be a clearer example of a State Court action being dispositive of the Federal action, at least as against plaintiff-appellee here.

CONCLUSION

The District Court should be reversed, the preliminary injunction denied and the complaint dismissed.

October 31, 1975

Respectfully submitted,

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Diesfeld - Shaw

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3rd day of Nov 1975 deponent served the within Brief upon: Paul C Bliets Trubin, Sillcocks, Edelman Knapp

attorney(s) for appellee

in this action, at 375 Park Ave NYC 10022

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies thereof enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 3 day of Nov 1975.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976